Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1898

and

No. 78-1906

ATLANTIC RICHFIELD COMPANY, et al,
Petitioners,

v.

NEWMAN OIL COMPANY, et al,
Respondents.

On Petition for Writ of Certiorari to the United States Temporary Emergency Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1898
and
No. 78-1906

ATLANTIC RICHFIELD COMPANY; FOREMOST PETROLEUM CORPORATION; and ALBERT B. ALKEK,

Petitioners,

v.

NEWMAN OIL COMPANY; ADVANCE PETROLEUM DISTRIBUTING COMPANY, INC.; B & H OIL COMPANY; CHAMBLES OIL COMPANY; D & S SERVICE COMPANY, INC.; ECON-O-GAS, INC.; FUEL DISTRIBUTORS, INC.; GABBERT OIL COMPANY; GOODING OIL, INC.; CRAIN OIL CO.; HAVARD OIL COMPANY, INC.; HENDERSON OIL & BUTANE CO.; HINSON OIL CO., INC.; HUNT COUNTY OIL CO.; BEN IVEY OIL COMPANY; NEWCOMER BUTANE & OIL CO.; MARTIN OIL COMPANY; R. L. MORE & SON; OATES OIL CO.; PERMIAN OIL & TIRE CO., INC.; W. C. RINKS OIL CO.; RODGERS OIL COMPANY; RAY SCHLICHTING OIL CO.; SERVICE OIL CO.; TANDEM OIL CO.; RALPH WATSON OIL CO., INC.; MARSH OIL CO., INC.; LAMBERTH OIL CO.; HORNET DISTRIBUTING CO.; STAPP OIL CO.; HRNCIR OIL CO.; WHITTEN OIL CO., INC.; MASON OIL COMPANY; J. G. MOORE OIL CO.; NEAL'S OIL & BUTANE, INC.; KELSO OIL COMPANY; W. D. (BILL) YOUNG OIL & SUPPLY; and BOSSE OIL CO.,

Respondents.

On Petition for Writs of Certiorari to the United States Temporary Emergency Court of Appeals

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents, Newman Oil Company, et al (identified above and in the Petitions) oppose the granting of the Petition For A Writ Of Certiorari of Albert B. Alkek ("Alkek") and Foremost Petroleum Corporation, Inc. ("Foremost") and the Petition For A Writ of Certiorari Of Atlantic Richfield Company ("ARCO") both to the United States Temporary Emergency Court of Appeals in Cause No. 5-32 in that Court.

STATEMENT

The statement of the case set forth in the opinion of The Temporary Emergency Court of Appeals of The United States ("TECA") is correct. (Appendix to this Brief; Appendix 1a, Alkek and Foremost Petition; and Appendix A-2, Atlantic Richfield Petition.) Each of the Petitions mischaracterizes the Opinion of TECA in their so-called "Questions Presented" and, as a consequence, in their "Statements". TECA determined that (1) there was a substantial procedural inadequacy in the trial court which *principally* necessitated the remand of the case for further proceedings and (2) the language of Section 210(a) of the Economic Stabilization Act, 12 U.S.C. 1904, note, (adopted by the Emergency Petroleum Allocation Act, 15 U.S.C. 754) is sufficiently broad to encompass a cause of action arising from a fraudulent representation intended to induce one to forego his rights under the Emergency Petroleum Allocation Act. Neither the "Questions Presented" by ARCO nor the "Questions Presented" by Alkek and Foremost addresses itself to the TECA decision and Opinion. ARCO casts a hypothetical question apparently designed as an attempt to make a particular prior case applicable to its answer.

Alkek and Foremost, on the other hand, attempt to cast a question solely in terms of "common law" fraud, although the remainder of their Petition clearly shows that the fraud in question was a fraud upon and involving a federal agency.

REASONS FOR NOT GRANTING THE WRITS

The decision and Opinion of TECA are imminently correct. Primarily, the Court vacated the judgment and remanded the case to the trial court because the concepts of notice and opportunity to be heard are fundamental and were inadequately provided for by the proceedings in the trial court.

In remanding, the Court of Appeals interpreted the language of Section 210(a) of The Emergency Stabilization Act (ESA), 12 U.S.C. 1904, note, as being sufficiently broad to encompass a cause of action arising from a fraudulent representation intended to induce one to forego his rights under the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. 751, *et seq.*

The Respondents contend, and it is a fact, that the so-called "Three-Party Agreements" (see the sample at A-29 of the ARCO Petition) were executed by each of the Respondents in reliance upon fraudulent representations by the Petitioners intended by the Petitioners to induce the Respondents to forego their rights under the EPAA.

One example of such rights, among others, is the waiver by the Respondents of their rights to appeal the orders issued by the Federal Energy Administration (the "FEA" and now the Department of Energy) pursuant to the Three-Party Agreements. As conceded by the Petitioners each of the Three-Party Agreements was "... an agreement with each Respondent *petitioning* the Federal Energy Admin-

istration ("FEA") to terminate ARCO's obligations as base period supplier and to assign those obligations to Foremost" (emphasis added, page 4, Alkek and Foremost Petition). Not only were the Three-Party Agreements each a fraudulently induced "contract", but each was a "petition" (i.e., a pleading) to a federal administrative agency fraudulently inducing the agency to issue "agreed", *nonappealable* orders. (See the last paragraph of the sample Three-Party Agreement at page A-30 of the ARCO Petition.)

Not only were the Three-Party Agreements *procured* by fraud upon the Respondents, but they were *filed* as a fraud upon a federal agency, the FEA. The regulations adopted by the FEA under the authority of the EPAA include specifically 10 CFR 205.203(f) which states:

> Willful concealment of material facts, or false, or fictitious or fraudulent statements or representations, or willful use of any false writing or document containing false, fictitious or fraudulent statements pertaining to matters within the scope of the EPAA or the FEAA by any person shall subject such person to the criminal penalties provided in 18 USC, § 1001 (1970). (CCH Energy Management, ¶ 13,402.30)

The violation of this regulation is a fraudulent wrong giving rise, under Section 210(a) of the ESA, to an expressed private right of action by an injured party (and if not expressed then clearly implied by Congressional intent).

Alkek and Foremost deal with semantical niceties in referring to the "arising under" language of 28 U.S.C. 1331 and 1337 and the "arising under" language of Section 211(a) of the ESA. These Sections are jurisdictional and do not create a cause of action as does Section 210(a) of the ESA relied upon by TECA. It is the *private cause of action* under federal law which a person may bring in "a district

court of the United States" which was in issue before TECA. The other statutes are jurisdictional *but* the "private right of action" under Section 210(a) (conceded by Alkek and Foremost in footnote 10, page 9, of their Petition) clearly is an action which any person suffering a legal wrong "may bring . . . in a district court of the United States".

Considering the language of Section 210(a) of the ESA, it can be seen that a private right of action is granted by Congress to "Any person suffering legal wrong *because of any act or practice arising out of* . . . (any) *regulation* issued pursuant (to the EPAA) . . ." (emphasis added). The private right of action is not with reference to cases "arising under" but with reference to "any act or practice arising out of" the regulations adopted pursuant to the EPAA.

Section 205.203(f) is without question a regulation adopted pursuant to the EPAA and *fraud* is without question an *act or practice* arising out of the violation of such regulation. The Respondents allege that they have suffered a legal wrong by virtue of the fraudulent representations of the Petitioners which were, as well, "Willful concealment of material facts, or false, or fictitious or fraudulent statements or representations or willful use of any false writing . . . pertaining to matters within the scope of the EPAA . . ." as described in the cited regulation.

The principal sleight-of-hand by the Petitioners seeks to remold the case to fit the totally different law and circumstances of *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951).

The Petitioners, as indicated above, have sought to deal with the jurisdictional statutes of the Judicial Code and the ESA (28 U.S.C. 1331 and 28 U.S.C. 1337, 12 U.S.C. 1904,

note, Section 211, respectively). As observed by this Court in *Montana-Dakota, supra*, the question there was *not* the jurisdiction of the federal courts, *but* rather whether the complaining party had a federal cause of action. In accusing TECA of being "illusory" in its distinction between this case and *Montana-Dakota, supra*, the Petitioners totally ignore (except in footnote 10, p. 9, Alkek-Foremost, Petition) the presence here of Section 210(a) of the ESA and the total absence of any such statute in The Federal Power Act considered in *Montana-Dakota, supra*, (except perhaps Section 317 of the Federal Power Act, 16 U.S.C. 825p, cited by the minority).

Here as in *Montana-Dakota, supra*, the question was not "jurisdiction" *but* "cause of action". The statute considered by this Court in *Montana-Dakota, supra*, had specific reference to the "rate-fixing" power of the Federal Power Commission and there was present no clear Congressional statement as is found in Section 210(a) of the ESA.

Section 210(a) states:

> Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in Section 211), and/or damages.

Further, as quoted above 10 CFR 205.203(f), which was adopted by the FEA under the clear mandate of the Congress in the EPAA (15 U.S.C. 751, *et seq.*), describes fraud as an "act or practice" which arises "out of" the violation of the regulations. The fraudulently obtained Three-Party Agreements became, as well, a fraud upon the FEA when filed by the Petitioners.

The Respondents suffered legal wrong by virtue of such fraud. Not as suggested by the Petitioners, in connection with the discretionary powers of the FEA, *but* in connection with the already formulated pricing rules of the FEA as applicable to ARCO and Foremost, respectively. It is undisputed that the fraudulently obtained FEA orders changed the supplier of the Respondents from ARCO to Foremost. At the time there were existing formulated prices which ARCO could charge the Respondents and *higher* existing formulated prices which Foremost could charge its customers. The pricing rules were adopted substantially prior to the events in controversy as a part of the FEA's legislative function and not as a "rate-fixing" function comparable to that of the Federal Power Commission in *Montana-Dakota, supra.*

By fraudulently obtaining the Respondents' agreement to the change of supplier, the Petitioners fraudulently induced the FEA to order the change, without the exercise of any discretion and without a hearing and without appeal.

Petitioners are engaged in attempting to create an illusion. Contrary to *Montana-Dakota, supra*, upon which they principally rely, they have attempted to confuse "jurisdiction" and "cause of action". This Court specifically condemned such confusion in *Montana-Dakota, supra.* The *real* question here (answered correctly by TECA) is: Is a federal cause of action established? There is no question but what the federal courts here, as in *Montana-Dakota, supra*, have the *power* to determine the question. With this confusion eliminated from the impression sought to be imparted by the Petitions, it is clear that Petitioners must concede the existence of a private federal cause of action and the jurisdictional statutes relied upon are not in question.

For example, footnote 10, page 9 of the Alkek and Foremost Petition states:

> The court of appeals mistakenly cited section 210(a) of the ESA as the basis for federal jurisdiction. The decisions of that court already have established, and it is clear as well from the statutory text, that it is section 211(a) that confers jurisdiction, *whereas section 210(a) operates to establish a private right of action.* (Citation of cases omitted.) In any event, since the scope of section 210(a) also is restricted to matters "arising out of this title", even if section 210(a) were jurisdictional its reach would be no broader than that of section 211(a). (emphasis added)

ARCO implements the confusion by suggesting at page 13 of its Petition:

> As is evident, the scope of Section 1331 (federal question) and 1337 (commerce clause) is much broader than and overlaps that of Section 210(a) of the ESA. For that reason, the *Montana-Dakota* holding that a fraud action does not come within the purview of the two broad jurisdictional statutes establishes *a fortiori* that a fraud action similarly does not come within the narrower purview of Section 210(a).

Further, ARCO cites cases, at page 10 of its Petition, in which parties sought injunctive relief against the FEA itself with reference to orders issued by the FEA after a clear exercise of discretion. However, here there is *no* such attack upon the FEA, which may have unwittingly been a victim of the Petitioners' fraud as were the Respondents.

Although there was no clear Congressional statement present in *Montana-Dakota, supra*, such as we have here in Section 210(a) of the ESA, the minority agrees, at 341 U.S. 263, that:

> We do not think it likely that Congress intended that there should be no relief for this kind of tampering with the federal regulatory scheme other than that which might be afforded by the . . . law of . . . the states.

The Petitioners use convenient catch words such as "federalized fraud" and "common law fraud" to mask the presence of the private federal cause of action clearly provided in Section 210(a) of the ESA resulting from the "act or practice arising out of" the violation of the regulations in the form of the "willful concealment of material facts"; the "false, or fictitious or fraudulent statements or representations" and "the willful use of any false writing . . . pertaining to matters within the scope of the EPAA" such as are condemned by 10 CFR 205.203(f), adopted under the authority of the EPAA.

In any event, even if there were *not* an expressed federal private cause of action, it is not outlandish for the federal courts to imply a private federal cause of action in favor of a party suffering injury by virtue of the violation of a federal statute or regulation. *Kardon v. National Gypsum Company*, 69 F. Supp. 512 (E.D. Pa. 1946); *J. I. Case v. Borak*, 377 U.S. 426 (1964); *Cort v. Ash*, 422 U.S. 66 (1975); *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967); *Texas and Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916).

The real lack of bona fides in the Petition, if not the perpetuation of the original fraud, is evident from the fact that ARCO contests the "jurisdiction" in whichever forum (the FEA or the courts) things are *not* going well for ARCO. For example, before the FEA in *Atlantic Richfield Company, Los Angeles, California*, 5 FEA ¶ 80,521 (CCH) at page 80,589, January 13, 1977, ARCO claimed unsuccess-

fully that the FEA was "without jurisdiction to issue the Remedial Order" because "under the provisions of Section 211(a) of the Economic Stablization Act of 1970 . . . the District Courts of the United States have exclusive original jurisdiction of cases or controversies arising under FEA regulations and orders".

Once the "jurisdiction versus cause of action" confusion sought to be created by the Alkek and Foremost Petition is unmasked, Alkek and Foremost concede that Section 210(a) deals with the creation of a cause of action just as was determined to be the case by TECA.

The effort by the Petitioners to divert attention from the real and substantial basis for the decision and opinion of TECA is, further, thwarted by the consistent deference of the FEA itself to the courts where issues of fraud are involved.

For example in *George P. Rios, Los Angeles County, California*, 4 FEA ¶ 83,008 (CCH) June 15, 1976; *Texaco, Inc., New York, New York*, 2 FEA ¶ 80,701 (CCH) October 6, 1975; and *Eagle Point School District No. 9, Eagle Point, Oregon*, 2 FEA ¶ 80,622 (CCH) June 1, 1975, the FEA has effectively held that it:

> will consider that termination of a base period supplier/purchaser relationship is warranted on gross inequity grounds if a determination has been made by a court of law that a purchaser has been defrauded by its base period supplier, or if a court of law has entered a judgment which would lead to the conclusion that the relationship between the supplier and the base period purchaser has deteriorated to the point where the purchaser's business operations would be significantly disrupted if it had to resume or continue a supply relationship with its base period supplier.

Although some of these cases involve state court proceedings instead of federal court proceedings, there is no basis for assuming that the position of the FEA would be different here. That is, the proper forum for determining issues of fraud is the courts. Here the act or practice is a violation of a specific federal regulation pertaining to matters within the scope of the EPAA, and Section 210(a) expressly provides a private cause of action in a United States district court.

CONCLUSION

For all of the foregoing reasons the Petitions are wholly without merit, if not frivolous, and should be denied.

Respectfully submitted,

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July 22, 1979

CERTIFICATE OF SERVICE

A copy of the above and foregoing Brief in Opposition has been served on counsel of record for each of the Petitioners.

APPENDIX
to
BRIEF IN OPPOSITION
TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-32

NEWMAN OIL COMPANY; ADVANCE PETROLEUM DISTRIBUTING COMPANY, INC.; B & H OIL COMPANY; CHAMBLIS OIL COMPANY; D & S SERVICE COMPANY, INC.; ECON-O-GAS, INC.; FUEL DISTRIBUTORS, INC.; GABBERT OIL COMPANY; GOODING OIL, INC.; CRAIN OIL CO.; HAVARD OIL COMPANY, INC.; HENDERSON OIL & BUTANE CO.; HINSON OIL CO., INC.; HUNT COUNTY OIL CO., INC.; BEN IVEY OIL COMPANY; NEWCOMER BUTANE & OIL CO.; MARTIN OIL COMPANY; R. L. MORE & SON; OATES OIL CO.; PERMIAN OIL & TIRE CO., INC.; W. C. RINKS OIL CO.; RODGERS OIL COMPANY; RAY SCHLICHTING OIL CO.; SERVICE OIL CO.; TANDEM OIL CO.; RALPH WATSON OIL CO., INC.; MARSH OIL CO., INC.; LAMBERTH OIL CO.; HORNET DISTRIBUTING CO.; BOSSE OIL CO.; STAPP OIL CO.; HRNCIR OIL CO.; WHITTEN OIL CO., INC.; MASON OIL COMPANY; W. D. (BILL) YOUNG OIL & SUPPLY; J. G. MOORE OIL CO.; NEAL'S OIL & BUTANE, INC. and KELSO OIL COMPANY,

PLAINTIFFS-APPELLANTS,

v.

ATLANTIC RICHFIELD COMPANY, ALBERT B. ALKEK and FOREMOST PETROLEUM CORPORATION, INC.,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Northern District of Texas, Dallas Division

(No. CA3-77-0435-F)

(Argued December 15, 1978 Decided April 20, 1979)

JOHN FEATHER, Johnston and Feather, P.C., Dallas, Texas (John C. Gabbert on brief) for the Appellants.

THOMAS R. MCDADE, Fulbright & Jaworski, Houston, Texas (Alton F. Curry, Steven E. Segal, Louis S. Zimmerman, and David L. Tolin of the same firm on brief) for the Appellees, Albert B. Alkek and Foremost Petroleum Corporation, Inc.

GREGORY S. C. HUFFMAN, Thompson & Knight (Jerry L. Buchmeyer, and David R. McAtee of the same firm on brief and William John Rathje, Los Angeles, California, of counsel) for Appellee, Atlantic Richfield Company.

Before HOFFMAN, INGRAHAM and GEWIN, Judges.

HOFFMAN, Judge.

Appellants, a large number of local distributors of petroleum products, brought suit against appellees alleging violations of the antitrust laws of the United States and Texas, the Emergency Petroleum Allocation Act of 1973 (the EPAA), the Clayton Act as amended, and common law breach of contract and false representation. There is no diversity of citizenship involved. Appellees filed motions to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure. The district court elected to interpret the motions to dismiss as motions for summary judgment, and dismissed with prejudice all of appellants' federal claims without any discovery proceedings. However, the court gave no notice to the parties that the motions were to be disposed of under Rule 56, and no opportunity was provided to file affidavits or other materials pertinent to appellants' claims. We are, therefore, compelled to reverse and remand for further proceedings.

The Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751, et seq. (1976), was enacted to alleviate the

shortages of petroleum products brought on by the Arab oil embargo. Distributors were required to return to the supplier who had supplied them in the 1972 base period, and were thereafter allocated the available product on a monthly basis in direct proportion to the ratio of the amount of petroleum products they had received from the supplier in the 1972 base period as compared to the total output of that refiner in the corresponding period of each year thereafter. Cost increases in refining the product are added to the base prices, primarily on a dollar-for-dollar basis. Provision is made for changing or substituting suppliers, pursuant to regulations of the Federal Energy Administration.[1]

The Atlantic Richfield Company (ARCO) was appellants' 1972 base period supplier. In late 1976 or early 1977 ARCO sold its Texas pipeline terminals to the Foremost Petroleum Corporation (Foremost) at which time ARCO, Foremost and each of the appellants executed three-party agreements on standard FEA forms which petitioned the agency to terminate ARCO's obligations as base period supplier and to assign the appellants' base period entitlements to Foremost. The three-party agreements were submitted to the agency for approval, and the FEA subsequently entered orders based on the agreements. The agreements make no mention of price, but refer only to volume. Appellants allege in the fourth count of their complaint that Albert B. Alkek, who exercised full authority over the day-to-day petroleum sales and distribution operations of Foremost, "falsely promised that each of the Plaintiffs would have the same price and other terms for the purchase of motor gasoline and diesel fuel as they had with ARCO (the base period

[1] FEA became a part of the Department of Energy on October 1, 1977, 42 U.S.C. § 7151(a); Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977). This opinion will refer generally to the FEA, as did the order of the district court.

supplier) and in effect would enjoy the same business practices as prevailed with ARCO during the base period subject to the legitimate adjustments available to ARCO." Appellants allege that within weeks thereafter Foremost "willfully and maliciously" instituted unilateral discriminatory and retaliatory price increases with intent to injure the appellants and remove them from competition with Foremost. In addition to price increases, appellants allege that Foremost willfully imposed discriminatory supply terminal requirements, withheld established freight allowances, and restricted credit terms, all contrary to normal business practices. The sixth count of the complaint sought recovery of damages against Foremost for breach of contract, against Alkek for inducing such breach of contract, and against both Foremost and Alkek for false and fraudulent promises and representations.

The fourth count alleges that "the Defendants [including ARCO] have undertaken a willful course based upon false and fraudulent promises to knowingly and drastically vary the base period supplier-purchaser relationships had by the Plaintiffs and other members of the Class." This allegation of fraud, while thin as to ARCO, is sufficient to withstand a Rule 12(b) (6) motion.

On December 15, 1977, the district court held a hearing on the appellees' motions to dismiss. No court reporter was present. The opinion of the district court indicates that, at the time of the hearing, counsel for both sides were in apparent agreement that the key issue in the case was whether or not Foremost was required to supply the appellants with motor fuel at ARCO's base price, and that the antitrust allegations made in appellants' complaint derived in their entirety from the alleged violations of the EPAA and the regulations promulgated thereto. Counsel for appellants stated at oral argument that the district court had indicated it would rule on the motion to dismiss within a week or ten days, and that the court at no time intimated that it intended to consider the motions under Rule 56. This statement is not contradicted. Eight months later the court entered the order granting summary judgment for the appellees.

The 1946 amendment to Rule 12(b) provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Moore's instructs: "It will also be observed that if a motion under Rule 12(b) (6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment." Advisory Committee Note of 1946 to Amended Subdivision 12(b) *Moore's Federal Practice*, Vol. 2A, ¶12.09[3] n. 25, at 2302. *See also* Wright and Miller, *Federal Practice and Procedure*, Vol. 5 § 1366, at 683. Rule 56(c) requires a ten-day period from the offering of the motion to the hearing of the motion, during which affidavits may be made and offered. Courts have required strict adherence to this notice requirement when a Rule 12(b) (6) motion is converted into a Rule 56 motion. *Davis v. Howard*, 561 F.2d 565, 571 (5th Cir. 1977); *Winfrey v. Brewer*, 570 F.2d 761, 764 (8th Cir. 1978); *Plante v. Shivar*, 540 F.2d 1233, 1235 (4th Cir. 1976). It is not necessary that the no-

tice of the conversion of the 12(b)(6) motion to one for summary judgment be made by written order; however, the record must demonstrate that all counsel were aware of the intentions of the district judge to treat the motion as converted, together with a reasonable opportunity to the non-moving party to rebut the converted motion. Since there is nothing in the record to indicate that the requisite notice was given, we find it necessary to reverse and remand to the district court. We express no view as to the final result in this case or whether, after further proceedings, a motion for summary judgment is in order.

A substantial question has been raised on appeal as to the jurisdiction of the federal court over claims involving common-law fraud. In essence appellants' theories of recovery center on their contention that they executed the three-party agreements as a result of assurances received from Alkek that prices and terms when dealing with Foremost would be "at least as good as those supplied by ARCO."[2] From this beginning point appellants sought to establish either that the three-party agreements are broad enough to include an agreement on price, or that pertinent FEA regulations establish price because of the nature of Foremost's acquisition of ARCO's terminals. Alternatively, appellants alleged that the assurances they received were fraudulent and constituted a willful attempt to circumvent the petroleum allocation act and regulations. Appellees argue that allegations of fraud are state law claims not cognizable in federal court under the jurisdictional prerequisites of the Economic Stabilization Act (ESA).

The EPAA, at 15 U.S.C. § 754(a)(1), adopted the provision for damages or other relief of the ESA, 12 U.S.C. § 1904

[2] Statement of counsel at oral argument on appeal.

note (1969 Supp.).[3] This court has broadly interpreted § 210(a) of the ESA to allow the recovery of any damages arising from any legal wrong, and has interpreted § 210(b) as creating a special remedy for overcharges rather than a limit on damages available under § 210(a). *Griffin v. United States*, 537 F.2d 1130, 1135-36 (Em.App. 1976); *cf Arnson v. General Motors Corporation*, 377 F.Supp. 209, 212 (N.D. Ohio 1974). There is case law, from a context closely analogous to the case at bar, that if a cause of action arises from fraud and deceit, it is a common-law action of which a federal court has no jurisdiction unless there is diversity of citizenship. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 241, 250 (1951).[4] Jurisdiction in that case, however, was derived from 28 U.S.C. §§ 1331 and 1337 as a civil action arising under an act of Congress regulating commerce. Jurisdiction in the present case is granted under § 210(a) of the ESA for "[A]ny per-

[3] § 210. Suits for damages or other relief.

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulations issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211) and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharges upon which the action is based, or

(2) not less than $100 or more than $1,000; . . . .

[4] This case involved two public electric utilities companies who were at one time under the same management through interlocking directorships and joint officers. During that relationship the two

son suffering legal wrong because of any act or practice arising out of this title. . . ." We interpret this language as being sufficiently broad to encompass a cause of action arising from a fraudulent representation intended to induce one to forego his rights under the EPAA.

It is the failure of the court to give notice of the conversion of the motion that principally necessitates the remanding of this case for further proceedings. We find no error in the manner in which the court construed the termination agreements on their face. The agreements make no mention of price, and the FEA has ruled that a purchaser who enters into a termination agreement, requesting and receiving FEA approval of the termination, thereby becomes a new wholesale purchaser under the express language of 10 C.F.R. 211.12(e). Interpretation 1977-28, 42 Fed. Reg. 46271, Sept. 15, 1977 (Mobil Oil Corporation). While we believe that appellants sufficiently stated their allegations of fraud and willfulness in the fourth and sixth counts of their amended complaint, we appreciate the opinion of the district court that price is the key issue, since it would appear that appellants' allegations of fraud were at all times secondary to their attempt to establish price under the per-

companies interchanged electric energy, shared expenses, and made a number of intercompany contracts establishing rates and charges, which contracts were filed with and accepted by the Federal Power Commission. The plaintiff company alleged that the interlocking directorships resulted in a constructive fraud, in that it paid unreasonably high prices for what it received, and unreasonably low rates for what it provided. The Court in effect held that it was the exclusive power of the Commission to establish reasonable rates, and that the Federal Power Act added nothing to the pre-existing common-law right not to be defrauded into paying an excessive or unreasonable rate. Mr. Justice Frankfurter dissented, joined by three other justices.

tinent regulations.[5] Nevertheless, "[T]he concepts of notice, admissibility, and opportunity to be heard are ancient primaries. . . . However correct the conclusion below may be in the end, we cannot allow the shaving of principles for expediency when those precepts assure order and justice." *Davis v. Howard, supra,* at 572.

VACATED AND REMANDED.

[5] Econ-O-Gas, Inc., an appellant herein, submitted an application for exception and petition for special redress to the Department of Energy, seeking relief from the three-party agreement it had signed with ARCO and Foremost. In denying relief, the DOE stated that Econ-O-Gas had not alleged that it was coerced in entering into the three-party agreement, and added that it was not the FEA's responsibility to make certain that Econ-O-Gas had read and understood the pricing regulations which would govern its relationship with Foremost or that the firm had reached a contractual relationship which it would find satisfactory from a business standpoint. Apparently fraud was not alleged before the DOE. See *Econ-o-Gas, Inc.,* Case Nos. DEE-1416, DSG-0031, 2 DOE ¶ ——— (February 12, 1979).